No. 17-1184

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

When assessing an applicant's eligibility for social security benefits on the basis of a disability, an administrative law judge ("ALJ") must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. § 404.1520(a)(4)(v). This determination must be supported by substantial evidence. *See* 42 U.S.C. § 405(g). In making the determination, an ALJ is authorized to call a vocational expert to testify about other work available to an applicant. *See* 20 C.F.R. §§ 404.1566(e), 416.966(e). These assessments occur hundreds of thousands of times annually.

The question presented is:

Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.

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OPINIONS BELOW

The decision of the Sixth Circuit (Pet. App. 1a) is reported at 880 F.3d 778 (6th Cir. 2017). The decision of the district court (Pet. App. 25a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 27, 2017.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 405(b)(1) provides:

> Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

42 U.S.C. § 405(g) provides:

> The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.

42 U.S.C. § 423(d)(2)(A) provides:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the

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[1] The district court had jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

> national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 1382c(a)(3)(B) provides:

> [A]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country

20 C.F.R. § 404.1520(a)(4)(v) provides:

> At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to

see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.

INTRODUCTION

Under 20 C.F.R. § 404.1520(a)(4) and 20 C.F.R. § 416.920(a)(4), an applicant must satisfy a "five-step sequential evaluation process" in order to demonstrate eligibility for social security benefits in light of a disability. *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). For the first four steps—through which an applicant must demonstrate the existence of a severe, medically determinable impairment that renders the applicant unable to perform his or her prior work—the applicant bears the burden of proof. If the applicant fails to meet this burden, he or she is deemed not disabled, and social security benefits are denied. If the applicant satisfies the first four steps, however, the burden shifts at the fifth step to the Social Security Administration ("agency"), which must demonstrate that the applicant can "make an adjustment to other work" and thus does not qualify for benefits. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). Upon judicial review, every factual finding made by the Administrative Law Judge ("ALJ")—including the ALJ's findings on each of the five steps—must be supported by substantial evidence to be deemed conclusive. *See* 42 U.S.C. § 405(g).

To satisfy its burden of proof in demonstrating the existence of "other work" available to applicants, the agency invariably relies upon the testimony of "vocational experts"—hired witnesses who are meant to

"provid[e] impartial expert opinion evidence about an applicant's vocational abilities." SSA, *Vocational Expert Handbook* at 7 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (*Vocational Expert Handbook*). These experts testify on two key points: the type of jobs available to an applicant and the number of such jobs that exist in the national economy.

At Petitioner Michael Biestek's disability benefits hearing, a vocational expert opined that Petitioner could have performed certain "sedentary unskilled occupations," specifically "bench assembler" and "sorter." Pet. App. 117a. Next, the expert opined that between 1000 and 8000 such jobs existed in Southeast Michigan within the relevant timeframe. The expert further testified that even an applicant with additional physical limitations would be able to perform the identified jobs, although the number of bench assembler and sorter jobs would drop by "about 20 to 30 percent." Pet. App. 117a.

Petitioner's lawyer questioned the accuracy of these figures and asked the expert for her data sources. In response, the expert referenced the *Bureau of Labor Statistics* "as well as [her] own individual labor market surveys." Pet. App. 119a. When Petitioner's lawyer asked for those surveys the expert refused to provide them in any form out of a concern for the "confidentiality of her files." Petitioner's lawyer pressed the issue and proposed a solution to ameliorate the "confidentiality" concern, but the ALJ cut off this line of inquiry. As a result, the expert's conclusion regarding the "other work" available to Petitioner—the sole basis for the

agency's denial of benefits for the designated period—was insulated from any meaningful scrutiny or evaluation.

In affirming the ALJ's ruling, the Sixth Circuit held that the testimony of a vocational expert, by itself, could constitute substantial evidence of the "other work" available to an applicant, even when the expert's testimony was based on data the expert withheld on cross-examination.

That decision is wrong. It fails to require "substantial evidence" supporting the ALJ's findings to sustain those findings on judicial review. It forecloses any meaningful assessment of the reliability of the expert's sources and the logic of the expert's methodology. It violates this Court's direction that the process for determining eligibility for Social Security disability benefits be fair and efficient. And it defies common sense. If the expert's opinion has a basis in real and reliable sources, there is no reason in law or logic why the expert should withhold those sources upon the applicant's express request. If, by contrast, the expert has no source for conclusions about the number of jobs available to an applicant, the expert's testimony standing alone cannot constitute substantial evidence of the other work available to an applicant.

Since 2002, the Seventh Circuit has required vocational experts to provide upon request the data upon which their testimony is based in order for the expert's testimony to constitute substantial evidence. That rule complies with Congress's mandate that the agency's factual findings be supported by substantial evidence in order to be conclusive upon judicial review.

And the rule works. Over the last sixteen years, the Seventh Circuit has enforced this rule without compromising the efficiency, finality, or fairness of social security hearings. This rule is also consistent with the agency's policies requiring vocational experts to testify consistent with the data sources upon which they rely.

The decision of the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

I. Social Security Disability Benefits

"From its inception, the social security system has been a program of social insurance" that provides "protection against the economic consequences of old age, disability, and death." *Califano v. Goldfarb*, 430 U.S. 199, 208 (1977). Undoubtedly, the "size and extent" of the program is "difficult to comprehend." *Richardson v. Perales*, 402 U.S. 389, 399 (1971). Yet, as this Court has instructed, the social security system "must be fair—and it must work." *Id.* (quoting Gov't's Br.).

A. Statutory Framework

The Social Security Act, passed in 1935, provides monetary benefits to individuals "whose disability prevents them from pursuing gainful employment." *Heckler v. Day*, 467 U.S. 104, 106 (1984). Under Title II of the Act, individuals may receive social security disability insurance (SSDI) benefits if they have a qualifying disability and are fully insured under the program. 42 U.S.C. § 423; *see id.* § 414 (defining "fully insured"). Under Title XVI of the Act, individuals may receive supplemental security income (SSI) benefits if they have a qualifying disability and meet a low-income

requirement. 42 U.S.C. § 1381. Both programs define qualifying disabilities in the same way. *See Sullivan v. Zebley*, 493 U.S. 521, 525 (1990) ("[The] statutory definition of disability [for SSI benefits] was taken from Title II of the Social Security Act."); *compare* 20 C.F.R. § 404.1505 *et seq.* (disability determinations for SSI benefits), *with id.* § 416.905 *et seq.* (disability determinations for SSDI benefits).

In 1939, Congress added a judicial review provision to the Act. The provision states, "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). In adding this provision, Congress envisioned a judicial review process "similar to those made for the review of decisions of many administrative bodies." H.R. Rep. No. 76-728, at 43 (1939); S. Rep. No. 76-734, at 52 (1939) (same). Congress has since confirmed that it intended "common procedural safeguards provided under the Social Security Act and the Administrative Procedure Act," including "the same rights to hearing and administrative and judicial review." H.R. Rep. No. 94-679, at 2-3 (1975).

At the same time that it provided for judicial review of social security determinations, Congress also clarified the procedures applicable in social security hearings: "Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. § 405(b). Through this language, Congress "widen[ed] the scope and . . . improve[d] the adequacy and the administration of these programs." H.R. Rep. No. 76-728, at 5. Consideration of evidence

beyond that normally permitted under formal rules of evidence "improv[ed]" benefits determinations by allowing consideration of all relevant information. *See Hearings Relative to the Social Security Act Amendments of 1939 Before the H. Comm. on Ways and Means*, 76th Cong. 3 (1939) (quoting proposed changes to the Social Security Act attached to letter of Dr. Arthur J. Altmeyer, Chairman, Social Security Board (Dec. 30, 1938)). Likewise, when Congress revisited this language in 1975, it explained that Title II of the Social Security Act is governed by the Administrative Procedure Act, which in turn "permits consideration of hearsay evidence while preserving the right of cross-examination." *Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 94th Cong. 9 (1975) (quoting Am. Bar Ass'n Brief Amicus Curiae at 12, *Richardson v. Perales*, 402 U.S. 389 (1971), 1970 WL 136652). Congress harmonized Title XVI with Title II and the Administrative Procedure Act, such that disability hearings are not governed by formal rules of evidence but nonetheless guarantee "adequate notice, access to evidence, [and the] right to cross examination." *Id.* at 10.

B. Disability Determinations

The Commissioner of Social Security is authorized to make factual findings and decisions "as to the rights of any individual applying for" social security disability benefits. 42 U.S.C. § 405(b)(1). Those findings and decisions take place in a tiered review process. To begin, an applicant submits a written application that results in an initial disability determination. Depending on the

applicant's state of residence, either the federal agency or a state counterpart makes that determination. 20 C.F.R. §§ 404.1503, 416.903. An applicant dissatisfied with the initial determination may seek reconsideration, or request a hearing before a disability hearing officer, or both. 20 C.F.R. §§ 404.902, 404.907; *id.* §§ 416.1402, 416.1407; *id.* §§ 404.914, 416.1414. If that hearing does not yield a satisfactory result, an applicant may seek a new hearing before an ALJ. 20 C.F.R. §§ 404.920, 416.1429. The applicant may appeal the ALJ's decision to the Appeals Council. 20 C.F.R. §§ 404.967, 416.1467. Applicants who exhaust these procedures may finally seek judicial review. 20 C.F.R. §§ 404.981, 416.1481; *see also* 42 U.S.C. § 405(g).

To qualify for either SSI or SSDI benefits on the basis of disability, an applicant must satisfy a five-step test. *First*, the applicant must not be engaged in any substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). *Second*, the applicant must have a severe medically determinable physical or mental impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). *Third*, if the applicant's impairment meets or equals an impairment listed in Appendix 1 of the Commission's regulations, the applicant is disabled and therefore eligible for benefits. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

If the applicant's impairment does not satisfy the third step, two steps remain. Thus, *fourth*, the applicant must be unable to perform his or her prior work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). And, *fifth*, the applicant must be unable, based on impairment, age, education, and work experience, to adjust to other work

available in the national economy—defined as "work which exists in significant numbers either in the region where such individual lives or in several regions in the country." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also* 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). Failure on any step, except for step three, renders the applicant ineligible for social security benefits.

The applicant bears the burden of proof for the first four steps. At the fifth step, however, the burden shifts to the agency to "provide evidence about the existence of work in the national economy that [the applicant] can do," taking into account the applicant's "residual functional capacity . . . , age, education, and work experience." 20 C.F.R. §§ 404.1512(b)(3), 416.912(b)(3) (internal citations omitted).

C. Vocational Experts

To meet its burden at step five, the agency "may use the services of a vocational expert or other specialist." 20 C.F.R. §§ 404.1566(e), 416.966(e). Vocational experts are hired by the agency to "provid[e] impartial expert opinion evidence . . . that an ALJ considers when making a decision about disability." *Vocational Expert Handbook* at 3. "Indeed, from an institutional perspective, the primary purpose of vocational expert testimony is to meet [the agency's] burden of proof in denying benefits to a disability claimant." 2 Thomas E. Bush, *Social Security Disability Practice* § 340 (2d ed. 2017). A vocational expert should have "[u]p-to-date knowledge of, and experience with, industrial and occupational trends and local labor market conditions," "[i]nvolvement in or knowledge of vocational

counseling" and the job placement of adults with disabilities, and experience using certain vocational resources published by the government. *Vocational Expert Handbook* at 8. But those qualifications are not mandatory. Indeed, "there are no readily available published standards for [vocational expert] certification, selection, or training." Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 Admin. L. Rev. 937, 968 (2010). As a result, "the experience, knowledge, ability, understanding of the [vocational expert] role, and the prejudices of individual [vocational experts] vary much more widely than do the comparable skills and experience of medical experts." Nathaniel O. Hubley, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot Be Touched*, 43 Val. U. L. Rev. 353, 368 n.56 (2008) (quoting Thomas E. Bush, *Social Security Disability Practice* § 340 (2006)). Vocational experts "often rely on assertions of personal knowledge, experience, or unspecified industrial surveys to justify job incidence conclusions." *Overcoming Gridlock*, 62 Admin. L. Rev. at 966. Courts and commentators have "expressed concern with the source and validity of the statistics that vocational experts trot out in social security disability hearings." *Alaura v. Colvin*, 797 F.3d 503, 507 (7th Cir. 2015) (internal citations omitted). In some instances, the conclusions offered by vocational experts seem "likely . . . to be a fabrication." *Id.* at 508.

As noted above, the ALJ must determine at step five whether there is other work available to the applicant.

Frequently, ALJs make this determination by asking vocational experts hypothetical questions regarding other available work. As the agency recognizes, the ALJ uses hypothetical questions because, "in many cases, the ALJ will not have determined what the claimant's [residual functional capacity] is when he or she asks [the vocational expert] for opinions about work." *Vocational Expert Handbook* at 35-36. Thus, for example, at Petitioner's hearing, the ALJ asked the vocational expert about the availability of unskilled light work, unskilled sedentary work, and unskilled work under the sedentary level. Pet. App. 116a-117a.

The ALJ will also take administrative notice of "reliable job information available from various governmental and other publications," including the *Dictionary of Occupational Titles* (*DOT*), the Bureau of the Census' *County Business Patterns* and *Census Reports*, the SSA's *Occupational Analyses*, and the Bureau of Labor Statistics' ("BLS") *Occupational Outlook Handbook*. 20 C.F.R. §§ 404.1566(d), 416.966(d). Vocational experts typically rely, at least in part, on those types of publications. But each publication has limitations. The *DOT*, for example, lists the job requirements for highly specific positions. *See, e.g.*, *DOT* 311 Waiters/Waitresses, and Related Food Service Occupations (listing, under separate job codes, "banquet, head," "captain," "head," "bar," "dining car (r.r. transp.)," "formal," "informal," "room service," "take out," and "buffet"). The ALJ and vocational expert, therefore, can pinpoint which waiter/waitress jobs an unskilled individual can perform (such as a take-out waiter/waitress) and which they cannot (such as head

waiter/waitress for a banquet). But "[t]he *DOT* . . . just *defines* jobs. It does not report how many such jobs are available in the economy." *Brault v. Soc. Sec. Admin.*, 683 F.3d 443, 446 (2d Cir. 2012) (emphasis in original).

Census data from the BLS contain information regarding the number of jobs available at metropolitan, state, and national levels. But the BLS aggregates jobs numbers for categories broader than those in the *DOT*. Thus, for example, BLS data will show the number of "waiter/waitress" jobs available nationally and by state but will not show which of these waiter/waitress jobs require unskilled or skilled labor, or which require heavy, medium, light, or sedentary exertion. *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Employment Statistics: Occupational Employment and Wages, May 2017: 35-3031 Waiters and Waitresses (Mar. 30, 2018), https://www.bls.gov/oes/current/oes353031.htm. The *Occupational Employment Quarterly*, a private publication, provides jobs numbers at a greater level of specificity than the BLS. But it uses data categorized under the Bureau's Standard Occupational Classification System (SOC), a more recent categorization system than the *DOT*. Thus, taking the *categories* of jobs from the *DOT* and matching them with the *numbers* of jobs in the *Occupational Employment Quarterly* requires analysis and judgment calls. "[A] VE must use some method for associating SOC-based employment numbers to DOT-based job types. The problem, however, is that DOT codes are much more granular than SOC codes," with thousands more job titles in the *DOT* than in the SOC. *Brault*, 683 F.3d at 446.

Vocational experts often resort to other sources of data for their testimony as well. Especially for the availability of sedentary unskilled jobs, vocational experts "tend to testify about numbers of jobs based on faulty assumptions with little or no support for their conclusions other than their own 'personal experience.'" 2 *Social Security Disability Practice* § 348.8 (2d ed. 2017). By way of illustration, a vocational expert might be asked to further refine job numbers to estimate, for example, the number of "bench sorter" jobs that permit individualized accommodations like unscheduled breaks for sitting. *Cf. id.* § 340 ("[W]hile vocational experts do have some expertise in assessing vocational opportunities, they have virtually no expertise in assessing how many jobs exist for a particular [residual functional capacity]."). None of the publicly available data sources evaluate the availability of work with these types of limitations. Thus in testifying on such questions, vocational experts rely upon privately sourced data.

Whatever the vocational expert relies upon, the expert should "be prepared to cite, explain, and furnish any sources [for his or her] testimony." *Vocational Expert Handbook* at 3, 19, 20, 28, 31. According to the agency's guidance, "[t]he ALJ will not rely on [the vocational expert's] testimony alone to make his or her ultimate decision about disability or any of the vocational findings that go into the decision." *Id.* at 9. But these guidelines are not binding on vocational experts or the ALJs. Thus, if a vocational expert refuses to provide his or her sources, the applicant has no means of examining whether the expert's conclusions are the

result of a reliable methodology applied to reliable data. Unless, that is, the hearing takes place within the Seventh Circuit.

II. Factual Background

Petitioner Michael Biestek worked for most of his career building scaffolding on construction sites. Pet. App. 3a, 109a. He became unemployed in June 2005 and has remained unemployed since due to depression, Hepatitis C, and lower back pain caused by a degenerative disc disease. Pet. App. 3a. Petitioner applied for social security disability benefits in March 2010, identifying the onset date for his qualifying disabilities as October 28, 2009. Pet. App. 3a.

After protracted proceedings, an ALJ denied Petitioner's application for benefits from October 28, 2009, his alleged onset date, to May 2013. The ALJ found Petitioner was not engaged in any substantial activity, had a severe medically determinable physical or mental impairment, and could not perform his prior work. Pet. App. 82a-83a, 108a. But the ALJ found Petitioner could perform other work that was readily available. Pet. App. 89a-90a, 109a-110a. In making this finding, the ALJ relied solely on the testimony of a vocational expert, who opined that Petitioner could perform the sedentary, unskilled job of a "bench assembler," with 240,000 jobs nationally and 6,000 jobs in Southeast Michigan, and a "sorter," with 120,000 jobs nationally and 1,500 jobs in Southeast Michigan. Pet. App. 111a, 116a. The vocational expert also opined that the number of bench assembler and sorter jobs would erode by 20 to 30 percent if the jobs were limited to only those that

could be performed under a sedentary exertion level.[2] Pet. App. 116a-117a.

At the hearing, Petitioner's counsel attempted to cross-examine the vocational expert about the foundation for her conclusions. The vocational expert testified that she relied on her "professional experience," "job analysis," and "individual labor market surveys" in estimating the number of jobs available to Petitioner, taking into account his individualized limitations. Pet. App. 117a-119a. But when asked to provide the "job analysis" and "individual labor market surveys," she refused. The expert testified that the information supporting her conclusions was "part of people's private confidential files" or "part of client files." Pet App. 118a-119a. When Petitioner's counsel suggested the expert redact any confidential information from her sources, the ALJ interjected, "I'm not requiring that." Pet. App. 118a; *see also id.* 119a. Petitioner's counsel was therefore unable to probe whether the sources that the vocational expert identified actually supported her testimony on the number of jobs available to Petitioner. The vocational expert's testimony, alone, resulted in the ALJ determining that Petitioner was not eligible for disability benefits.[3] *See* Pet. App. 109a-112a.

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[2] The agency recognizes that some individuals have a residual functional capacity "for less than a full range of sedentary work." SSR 96-9p, 1996 WL 374185, at *1 (July 2, 1996).

[3] The ALJ found Petitioner eligible for disability benefits beginning in May 2013, because his advanced age at that time seriously impacted his ability to adjust to other work. Pet. App. 112a; *see* 20

On review, the district court upheld the ALJ's ruling, concluding substantial evidence supported the finding that other work was available to Petitioner. The district court ruled that the vocational expert's testimony on this point was sufficient even though the expert refused to provide any of the data underlying her testimony. *See* Pet. App. 28a-30a.

The Sixth Circuit affirmed. It rejected any "oblig[ation for] vocational experts to provide the data and reasoning used in support of their conclusions upon request." Pet. App. 21a. The court recognized a circuit split "between the Seventh Circuit and several other circuits" on the key issue: whether a vocational expert's testimony constitutes substantial evidence of other work when the expert withholds sources that allegedly support his or her bottom-line conclusions. Pet. App. 20a. The court reasoned that requiring a vocational expert to supply the foundation for his or her opinion would "effectively import a key provision of the Federal Rules of Evidence into Social Security proceedings." Pet. App. 21a. The requirement, the court believed, would conflict with Congress's intent to "specifically exempt[] Social Security disability proceedings from the strictures of the Federal Rules of Evidence, [and] allow[] ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law." Pet. App. 21a.

C.F.R. §§ 404.1563(d), 416.963(d). That determination is not at issue here.

SUMMARY OF ARGUMENT

A vocational expert's testimony cannot constitute "substantial evidence" of "other work," 42 U.S.C. § 405(g), if the vocational expert refuses upon request to provide the data underlying that testimony.

I.A. As this Court held in *Richardson v. Perales*, 402 U.S. 389 (1971), in a social security hearing, an expert's conclusions must have evidentiary support and be subject to meaningful cross-examination to constitute "substantial evidence." *Perales* also recognized that when applicants fail to avail themselves of available processes for probing expert conclusions, they effectively acquiesce to the substantiality of the evidence. *Perales* thus bars an ALJ from refusing an applicant's request for data underlying the vocational expert's conclusions. Without the underlying data, there is no way to assess the vocational expert's evidentiary support or subject the vocational expert's conclusions to even a modicum of meaningful testing through cross-examination. Requiring production only upon request achieves both of these objectives while preserving expediency and efficiency in social security proceedings, as *Perales* commands.

I.B. The statutory requirement that an agency's factual findings be supported by substantial evidence applies in various other regulatory contexts. This Court's decisions in those contexts confirm that conclusions by agency experts that lack an identifiable foundation in facts cannot constitute substantial evidence. Indeed, many cases require the production of an expert's underlying data and confirm that an agency

decision-maker must be able to test an expert's conclusion by reference to the data. Even in the rare case where this Court has accepted an expert's testimony without the provision of first-hand evidence, the Court's reasoning underscores this general requirement.

II.A. Requiring vocational experts to provide upon request the data underlying their conclusions does not import the Federal Rules of Evidence or the requirements of *Daubert* into social security proceedings. As exhibited over the past sixteen years in the Seventh Circuit, this rule is limited in scope and measured in its impact on the length of hearings and the burden on both ALJs and vocational experts.

II.B. Although the Federal Rules of Evidence do not apply in social security hearings, in passing the Social Security Act, Congress did not eliminate the fundamental common-law requirement that expert testimony be reliable before a decision-maker can rationally rely upon it. The most critical means of assessing the reliability of an expert's testimony is through meaningful cross-examination that tests the rigor of an expert's methodology and the legitimacy of the expert's data. If the vocational expert withholds the data upon request, the applicant and the agency lack the tools necessary to conduct this critical assessment of reliability.

II.C. A vocational expert's experience and credibility do not assure reliable conclusions. Credibility asks whether an expert is truthful; and, indeed, where testimony does not rely upon actual data, professional

experience may constitute a sufficient basis for an expert's conclusions. But reliability asks whether factual evidence actually supports an expert's conclusion. Credibility and experience cannot identify how many jobs of a particular sort exist in a defined geographic region at a specific point in time. Underlying data is necessary to reach this type of a conclusion, and the provision of this data is thus necessary to assess whether a vocational expert's conclusions are actually grounded in fact.

III. Finally, requiring a vocational expert to provide the underlying data upon request is consistent with the agency's policies and with common sense. The agency itself, in nonbinding guidance, advises vocational experts to be prepared to furnish their underlying data at disability determination hearings, and informs vocational experts that an ALJ will not rely solely on their testimony when determining whether "other work" exists in sufficient numbers. In other guidance, the agency charges ALJs with analyzing data sources that are inconsistent with the vocational expert's testimony before the ALJ may accept the expert's testimony as conclusive. This same rationale should govern here.

In order to assure that the agency has met its burden of demonstrating the existence of other work with more than merely the uncorroborated say-so of a vocational expert, ALJs should require that the expert's underlying data be provided upon request. If the evidence exists, the vocational expert can efficiently provide it, as the Seventh Circuit's rule demonstrates. If it does not exist, the agency and reviewing court can

then probe what possible basis the expert might have for his or her testimony in the first place.

ARGUMENT

I. A VOCATIONAL EXPERT'S TESTIMONY CANNOT CONSTITUTE "SUBSTANTIAL EVIDENCE" OF "OTHER WORK" UNDER 42 U.S.C. § 405(g) IF THE VOCATIONAL EXPERT REFUSES TO PROVIDE, UPON REQUEST, THE DATA UNDERLYING THAT TESTIMONY.

In interpreting provisions of the Social Security Act, this Court begins, "as usual, with the statutory text." *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017); *see also Gisbrecht v. Barnhart*, 535 U.S. 789, 799 (2002). The relevant statutory provision here provides "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Under this Court's well-established precedent, "substantial evidence" requires more than the say-so of a vocational expert. It requires reliable expert testimony subject to meaningful probing by an adverse party or the decision-maker. The Sixth Circuit's decision below disregards this requirement.

A. *Richardson v. Perales* Mandates That Vocational Experts Provide The Data Underlying Their Conclusions Upon An Applicant's Request.

1. *Perales* identifies various indicia of reliability that expert testimony must possess to constitute "substantial evidence" under § 405(g).

In *Richardson v. Perales*, this Court considered the precise question of what "substantial evidence" requires for expert evidence introduced at disability hearings. 402 U.S. at 401. In approaching this question, the Court emphasized that the standards governing disability determinations "should be understandable to the layman applicant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation." *Id.* 400-01. Consistent with "the obvious intent of Congress," hearings should be "informal rather than formal"—"so long as the procedures are fundamentally fair." *Id.*

Cognizant of the requirements that social security benefits proceedings be efficient, accessible, and fair, the Court determined that "substantial evidence" in this context means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 401 (quoting *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 230 (1938)). Material presented to the agency "without a basis in evidence having rational probative force" cannot constitute "substantial evidence." *Perales*, 402 U.S. at 407 (internal quotation marks omitted).

The Court then applied this standard to the expert evidence introduced at the applicant's hearing. The applicant in *Perales* challenged written reports submitted by four licensed physicians who had examined the applicant but who did not testify at the hearing. The applicant argued that the written reports could not constitute "substantial evidence" because none of the physicians were cross-examined and because the only live testimony presented at the hearing contradicted the written reports and supported his claim. This Court rejected the argument, highlighting "a number of factors that, we feel, assure [the] underlying reliability and probative value" of the challenged expert evidence. *Id.* at 402. Two of those considerations have particular relevance here.

First, the Court emphasized the robust evidentiary foundation for the expert reports. The Court explained "[t]he particular reports of the physicians who examined claimant Perales were based on personal consultation and personal examination and rested on accepted medical procedure." *Id.* at 403. The reports reflected an "impressive range of examination" by experts in different specialties, including "a patient and careful endeavor by the state agency and the examiner to ascertain the truth." *Id.* at 404. In the reports, the experts carefully detailed their examinations, providing not only their bottom-line conclusions on disability but also the results of specific tests they performed to reach those results. *Id.* at 403-04. The medical reports in *Perales* thus afforded the hearing examiner, and the reviewing courts, the opportunity to evaluate whether the doctors' diagnoses logically flowed from the examinations upon which they were based. Buttressing

the Court's confidence in the reports' conclusions was the lack of any "inconsistency whatsoever in the reports," despite the fact that "each result was reached by independent examination in the writer's field of specialized training." *Id.* at 404.

Second, in assessing whether "substantial evidence" supported the ALJ's finding, the Court found salient that the applicant had failed to avail himself of procedures for testing the "reliability and probative value" of expert evidence in disability hearings. *Id.* at 402. The Court noted that although the applicant complained of not being able to "cross-examine the reporting physicians" whose written reports contributed to the ALJ's adverse determination, the applicant had failed to take advantage of the procedure that would have afforded him that very opportunity: asking the ALJ to issue subpoenas for the appearance and testimony of the physicians. *Id.* at 404-05; 20 C.F.R. § 404.950(d).[4] Because the physicians were subject to subpoena and cross-examination, relying on their reports did not diminish the "integrity" or "fairness" of the hearing. And because the applicant did not pursue his opportunity to subpoena and cross-examine the witnesses, the applicant could not "complain[] that he was denied the rights of confrontation and cross-examination." *Perales*, 402 U.S. at 405; *see also id.* at 402.

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[4] At the time that *Perales* was decided, 20 C.F.R. § 404.926 allowed ALJs and members of the Appeals Council to issue subpoenas on their own initiative or on request of either party. That regulation was moved in 1980 to 20 C.F.R. § 404.950(d), but its substance remains the same.

Perales thus demonstrates the contours of "substantial evidence" in social security proceedings. Expert testimony cannot be "substantial evidence" if there is no viable means of verifying whether the testimony is reliable. That verification is best facilitated by making the underlying data available to the applicant and permitting the applicant to test the data and conclusions drawn from the data through cross-examination. But *Perales* also recognizes that an applicant may acquiesce to the reliability of expert testimony by declining to challenge reliability in agency proceedings. What *Perales* does not permit, however, is deeming expert testimony "substantial evidence" when there is no means of verifying the evidence upon which the testimony is based, and an applicant does not acquiesce to the reliability of the testimony. Yet that is precisely what the Sixth Circuit countenanced below.

2. Under *Perales*, the testimony of a vocational expert cannot constitute substantial evidence when an expert withholds the data upon which the testimony is based.

The Sixth Circuit's approach conflicts with *Perales* in two important ways. *First*, a court cannot test the factual predicates for an expert's conclusions when the expert withholds the underlying data. In the opinion below, the Sixth Circuit found substantial evidence of the number of jobs available to Petitioner (including the vocational expert's subsequent reduction of those numbers "by about 20 to 30 percent" in response to a hypothetical question by the ALJ) based solely upon the say-so of the vocational expert. Pet. App. 117a. The

expert purported to rely in part on her "individual labor market surveys," but she refused to provide these sources. Pet. App. 119a. As a result, neither Petitioner nor the ALJ could determine whether the expert's underlying data were "such ... as a reasonable mind might accept as adequate to support [the expert's] conclusion." *Perales*, 402 U.S. at 401 (internal quotation marks omitted). The reliability of the vocational expert's conclusions was therefore unknowable, in contrast to the medical reports in *Perales*, which had substantial and articulable support. As such, the ALJ's conclusion regarding other work available to Petitioner was based on little more than "uncorroborated hearsay." *Consolidated Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 230 (1938); *see also Chavez v. Berryhill*, 895 F.3d 962, 969 (7th Cir. 2018) ("What is entirely lacking is any testimony from the VE explaining why he had a reasonable degree of confidence in his estimates.... The absence of any such testimony left the ALJ without any reasoned and principled basis for accepting the job-number estimates."); *Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) ("For [the vocational expert] to offer the number 24,500 with no indication of how he adjusted the numbers in the dictionary to reflect Barrett's diminished capacity leaves us in the dark about the actual basis of his testimony."). Without underlying data, applicants "have little to no meaningful opportunity to challenge the methodological or empirical reliability of vocational expert testimony." Carolyn A. Kubitschek & Jon C. Dubin, *Social Security Disability: Law & Procedure in Federal Court* § 3:106, Westlaw (Apr. 2018 Update).

For much the same reason, permitting a vocational expert to withhold underlying data renders it impossible to assess whether the vocational expert's conclusions regarding jobs numbers are even consistent with the very sources upon which the expert claims to rely. By denying an applicant access to the data source or sources upon which a vocational expert has relied, an ALJ insulates the expert's testimony from any analysis of internal inconsistencies. Indeed, here the vocational expert identified *two* sources of data upon which her analysis was based—"the *Bureau of Labor Statistics* as well as [her] own individual labor market surveys." Pet. App. 119a. If the various sources relied upon by the vocational expert conflict, the expert's testimony alone cannot constitute substantial evidence. *See Perales*, 402 U.S. at 404. Yet by preventing any evaluation of what an expert's data actually reveal, the Sixth Circuit's decision countenances exactly this result.

Second, unlike the applicant in *Perales*, Petitioner specifically sought to avail himself of the mechanism open to him for effectively probing the expert's conclusion: requesting the underlying data during cross-examination. *See* Pet. App. 20a. Although Petitioner's counsel had the opportunity to question the vocational expert, without the data upon which the expert's testimony rested, he could not test whether the vocational expert's conclusions were based on anything more than the "suspicion of the existence of the fact to be established." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Lack of the requested data did not merely hamper Petitioner at cross-examination; it also meant the ALJ reached a conclusion based solely on the say-so of the expert

without even reference to, let alone analysis of, the "labor market studies" the expert claimed as part of the basis for her conclusions. *Perales* requires the opposite result when an applicant takes advantage of the available mechanisms for testing an expert's reliability.

3. Requiring vocational experts to provide upon request the data underlying their testimony satisfies the indicia of reliability identified in *Perales*.

Requiring a vocational expert to provide underlying data upon request vindicates this Court's holding in *Perales*. Recognizing that "an ALJ's findings must be supported by substantial evidence," the Seventh Circuit has noted "an ALJ may depend upon expert testimony only if the testimony is reliable." *McKinnie v. Barnhart*, 368 F.3d 907, 910 (7th Cir. 2004) (per curiam). Thus, when an applicant seeks to understand the basis for a vocational expert's conclusions regarding "other work," the applicant can cross-examine the expert—"an approach deemed adequate in *Richardson v. Perales*." *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). While a vocational expert is "'free to give a bottom line,'" during this examination, "the data and reasoning underlying that bottom line must be 'available on demand' if the applicant challenges the foundation of the vocational expert's opinions." *McKinnie*, 368 F.3d at 911 (quoting *Donahue*, 279 F.3d at 446).

Thus, in *McKinnie*, an expert provided estimates for the number of jobs available to the applicant in the regional economy, but "did not substantiate her findings with a written report or other documentation to substantiate her figures," and provided "vague

responses to McKinnie's questioning." *Id.* As a result, the court found the agency had failed to establish by substantial evidence "the existence of a significant number of jobs that the claimant can perform." *Id.*

Yet—again like *Perales*—"[w]hen no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion." *Donahue*, 279 F.3d at 446. Thus, in *Barrett v. Barnhart*, 355 F.3d 1065 (7th Cir. 2004), although the court was left "in the dark" as to the basis for the expert's conclusion regarding the number of jobs available to the applicant, any objection was "forfeited" because the applicant's lawyer "did not question the basis for the vocational expert's testimony, purely conclusory though that testimony was." 355 F.3d at 1067.

Requiring the production of underlying data upon request thus combines the requirement that an ALJ's conclusion be based on substantial evidence, not mere say-so, with *Perales*'s instruction that an applicant cannot attack the substantiality of an expert's conclusions when the applicant fails before the agency to take advantage of the procedural mechanisms available for probing those conclusions. *See Shaibi v. Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2017) ("[W]hen a claimant fails entirely to challenge a vocational expert's job numbers during administrative proceedings before the agency, the claimant forfeits such a challenge on appeal, at least when that claimant is represented by counsel."). This rule achieves precisely the balance between procedures that are "liberal and not strict in tone" and yet "fundamentally fair," that this Court recognized as

the "obvious intent of Congress" in the Social Security Act. *Perales*, 402 U.S. at 400-01.

B. This Court's Rulings In Other Administrative Contexts Confirm That "Substantial Evidence" Requires Experts To Provide Upon Request The Data Underlying Their Testimony.

In elucidating the contours of the "substantial evidence" standard, *Perales* cited to this Court's interpretation of that phrase in a variety of regulatory contexts. *See Perales*, 402 U.S. at 401 (citing *Consolidated Edison Co.*, 305 U.S. 197, and *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), applying the National Labor Relations Act, and *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), applying the Administrative Procedure Act). As this Court has recognized, "[t]he statutory phrase 'substantial evidence' is a 'term of art' in administrative law that describes how an administrative record is to be judged by a reviewing court." *T-Mobile S., L.L.C. v. City of Roswell*, 135 S. Ct. 808, 815 (2015) (quoting *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)). When interpreting the term "substantial evidence" in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, the Court found "no reason discernable from the text of the Act to think that Congress meant to use the phrase in a different way" than in other provisions setting the standards for judicial review of agency action. *T-Mobile S.*, 135 S. Ct. at 815. The same is true here. Congress intended "substantial evidence" in the Social Security Act to provide the same substantive and procedural protections during judicial

review that exist in other agency contexts. H.R. Rep. No. 76-728, at 43; S. Rep. No. 76-734, at 52; *see also* H.R. Rep. No. 94-679, at 2-3. This Court thus can and should look to analogous administrative contexts where an agency's findings must be supported by substantial evidence to survive judicial review.

Of greatest relevance here, this Court has urged special caution when finding "substantial evidence" based on expert testimony. In *Baltimore & Ohio Railroad Co. v. Aberdeen & Rockfish Railroad Co.* ("*Baltimore & O. R.R. Co.*"), 393 U.S. 87 (1968), this Court held that the Interstate Commerce Commission's allocation of revenue between Southern and Northern rail lines was not supported by substantial evidence. Specifically, the Court faulted the Commission for using the Northern rail lines' blended average costs as a basis for allocating revenues when 80% of the Northern rail lines' traffic was solely within the North, and it was "difficult to maintain that these intraterritorial Northern costs are the same or approximately the same as the Northern costs in handling traffic between North and South." *Id.* at 90. Crediting the Board's use of the average costs, this Court found, "would in effect be saying that the expertise of the Commission is so great that when it says average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is." *Id.* at 91-92. Acceptance of this characterization of the facts, this Court found, would render the requirement that the Commission's actions be "based on substantial evidence ... lost in the haze of so-called expertise." *Id.* at 92.

The very same danger exists here. While "[p]recision and exactitude in the mathematical sense" may not be possible in a vocational expert's estimate of various job categories in the national economy, that is a far cry from saying that the agency can satisfy its burden of demonstrating other work on the testimony of the expert alone. *Id.* Accepting the expert's testimony in this regard—*particularly* when challenged by the applicant—would, like *Baltimore & O. R.R. Co.*, improperly assume administrative expertise at the cost of actual evidence. *See also Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (recognizing that, in defining substantial evidence review, "the Court has stressed the importance of not simply rubber-stamping agency factfinding").

In other administrative contexts, this Court has noted that substantial evidence "afford[s] a substantial basis of fact from which the fact in issue can be reasonably inferred." *Columbian Enameling & Stamping Co.*, 306 U.S. at 299. Thus, in *Columbian Enameling*, the Court held that substantial evidence did not support the National Labor Relations Board's conclusion that an employer had improperly refused to bargain collectively with its employees. In finding the Board's conclusion not adequately supported, the Court noted a crucial fact was missing from the Board's record. Although the deficiency was "pointedly bought to the attention of the Board . . . no attempt was made to supply the omission." *Id.* at 298. As a result, the Board's decision on this significant point rested on a "matter of conjecture" that the Court deemed insufficient to satisfy the substantial evidence standard. *Id.* at 299, 300.

As seen in the opinion below, permitting reliance on expert testimony despite the applicant's request for underlying data countenances almost precisely the error this Court identified in *Columbian Enameling*. The Sixth Circuit recognized that Petitioner requested the data underlying the expert's opinion and argued that "little substantiates the reliability of the vocational expert's testimony other than her word," such that it "falls short of 'substantial evidence.'" Pet. App. 20a. Yet despite having pointed out to the agency an "omission" in the record that constrained the agency to rely on the expert's "conjecture" alone rather than substantial evidence, the Sixth Circuit nonetheless affirmed the agency's finding. *Columbian Enameling* requires otherwise. *Columbian Enameling*, 306 U.S. at 299-300.

Equally elucidating is the rare case in which this Court *has* found an agency's decision supported by substantial evidence when the decision was based on expert testimony alone. In *Federal Power Commission v. Florida Power & Light Co.* ("*FP&L*"), 404 U.S. 453, 462-463 (1972), this Court reversed the Fifth Circuit and held the Federal Power Commission had jurisdiction over the respondent because the respondent was engaged in the transmission of electric energy in interstate commerce. The Court noted that the Commission had accepted the testimony of an expert regarding the transmission of power, even though "[t]he elusive nature of electrons renders experimental evidence that might draw the fine distinctions required by this case practically unobtainable." *Id.* at 466-67. Nonetheless, the expert's testimony was "probed, and in our opinion not undercut, by the hearing examiner's questions . . . [and] cross-examination." *Id.* at 463 Thus,

the Court held, "well-reasoned expert testimony—based on what is known and uncontradicted by empirical evidence—may in and of itself be 'substantial evidence' when first-hand evidence on the question (in this case how electricity moves within a bus) is unavailable." *Id.* at 464-65. *FP&L* is instructive because it demonstrates the type of situation—when actual evidence simply does not exist but well-reasoned expert testimony is uncontradicted—in which substantial evidence can be found based on an expert's (or multiple experts') testimony alone.

This is vastly different from the case here, in which an expert makes a statement, acknowledges under questioning that the statement *is* based on first-hand evidence in the expert's possession, but then refuses to share that evidence. *FP&L* declined to require an expert to conduct the type of studies that, "if they are feasible at all—would take one or two years to conduct," in order for the agency to rely upon the expert's testimony. *Id.* at 467-68. But that is entirely different than requiring an expert to produce upon request a study the expert *already* conducted and upon which they explicitly base their testimony. *Id.*

II. FINDING AN EXPERT'S TESTIMONY, ALONE, TO BE SUBSTANTIAL EVIDENCE IGNORES THE REQUIREMENT THAT TESTMIONY BE RELIABLE, AND CONFLATES THE CREDIBILITY OF AN EXPERT WITH THE RELIABILITY OF THE EXPERT'S EVIDENCE.

Courts, like the Sixth Circuit, that consider a vocational expert's say-so to be substantial evidence, notwithstanding a challenge from the applicant, have done so for three misguided reasons.

First, these courts note that "[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. § 405(b)(1). They then conclude that requiring vocational experts to provide upon request the data underlying their testimony would violate § 405(b)(1) by "effectively import[ing] a key provision of the Federal Rules of Evidence into Social Security proceedings." Pet. App. 21a. These courts likewise criticize the Seventh Circuit for "acknowledg[ing] . . . that ALJs are not bound by the Rules of Evidence, but then turn[ing] around and requir[ing] ALJs to hew so closely to *Daubert's* principles." *Brault*, 683 F.3d at 449; *Purdy v. Berryhill*, 887 F.3d 7, 16 (1st Cir. 2018); *Welsh v. Comm'r Soc. Sec.*, 662 F. App'x 105, 109 (3d Cir. 2016). But as seen in the Seventh Circuit, requiring the production of underlying data does not apply a *Daubert*-like standard that would determine whether a vocational expert's testimony is admissible in the first place. Vocational

experts in the Seventh Circuit can and do testify without any *Daubert*-like gatekeeping procedure to assess their qualifications. Moreover, hearings within the Seventh Circuit are not constrained by the myriad procedural and substantive rules applicable to experts in civil litigation.

Second, courts that reject the Seventh Circuit's approach ignore that in choosing not to apply the Federal Rules of Evidence to social security proceedings, Congress did not jettison the common-law rule that an expert's testimony must be reliable. That common law requirement has always governed a decision-maker's acceptance of expert testimony, including in the administrative context. Access to the data underlying an expert's testimony, if requested, is a critical means of ensuring this reliability.

Third, the Sixth Circuit and the courts that agree with it conflate reliability and credibility. In rejecting the Seventh Circuit's approach, the Sixth Circuit noted that ALJs "carefully weigh the credibility of witnesses who testify," and thus their "acceptance of [that] testimony cannot be said to have been improper." Pet. App. 22a (quoting *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 481 (6th Cir. 1988)). But the "credibility" of a vocational expert is a red herring. An expert may be credible in the sense that the expert has no bias, is truthful, and demonstrates sufficient experience and education. But those attributes have little bearing on whether an expert's testimony regarding a specific number of jobs, in a specific region, at a specific time, is reliable. *That* inquiry does not concern an expert's credibility, but turns instead on the

accuracy of the underlying data and the rationality and rigor of the analysis. Reliability and credibility are simply not the same thing. While an expert's general credibility is important, it does not demonstrate that specific conclusions are reliable and supply the requisite "substantial evidence" to give a factual finding conclusive effect on judicial review. *See, e.g.*, Pet. App. 22a ("[I]t is undoubtedly true that vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence."); *Brault*, 683 F.3d at 450 ("[W]e agree with the Seventh Circuit that evidence cannot be substantial if it is 'conjured out of whole cloth.'" (internal citation omitted)).

A. Requiring vocational experts to provide upon request the data underlying their conclusions does not import the Federal Rules of Evidence into social security hearings.

It is undisputed that "strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." *Perales*, 402 U.S. at 400; 42 U.S.C. § 405(b)(1). But the Second and Sixth Circuits are simply wrong when they claim the Seventh Circuit's approach "acknowledge[d] in *Donahue* that ALJs are not bound by the Rules of Evidence, but then ... require[d] ALJs to hew so closely to [them]." Pet. App. 21a (quoting *Brault*, 683 F.3d at 449). A brief comparison of the requirements of the federal rules that govern the testimony of experts in courtrooms with the rules governing the testimony of vocational experts within the Seventh Circuit makes this point clear.

Once an expert has satisfied the various disclosure requirements laid out in Rule 26 of the Federal Rules of Civil Procedure—none of which of course apply here—an expert's proffered testimony is next subjected to various tests imposed by the Federal Rules of Evidence and this Court's interpretations of those rules. Specifically, *Daubert* and *Kumho Tire* require the trial court to play "a gatekeeping role" for expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42 (1999). The trial court measures the expert's proffered testimony against Rule 702 to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. If the expert clears that hurdle, the expert may testify at trial. If an expert does not clear the *Daubert* hurdle, evidence from that expert is inadmissible at trial. *See, e.g., In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787, 797 (3d Cir. 2017) ("[A]ny step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." (internal quotation marks omitted)). Even if an expert surmounts *Daubert*, any testimony received at trial is subject to various limitations set forth in the Federal Rules of Evidence and can be attacked through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," aided by voluminous pretrial disclosures. *Daubert*, 509 U.S. at 595-96.

As seen in the Seventh Circuit, requiring underlying data from vocational experts upon request imports none of these requirements. The Seventh Circuit has

expressly recognized that "Rule 702 does not apply to disability adjudications," which it properly characterizes as "a hybrid between the adversarial and the inquisitorial models." *Donahue*, 279 F.3d at 446 (citing *Perales*, 402 U.S. 389). Thus, unlike under *Daubert* and Rule 702, there is no preliminary hearing prior to a vocational expert's testimony, let alone a requirement that an expert produce a report or summary in advance of testifying that details the expert's experience, compensation, conclusions, and factual support. Moreover, vocational experts testifying in social security disability hearings within the Seventh Circuit are subject to none of the requirements of the Federal Rules of Evidence. And social security proceedings in the Seventh Circuit are unburdened by the requirements of the Federal Rules of Evidence in myriad ways, from reliance on hearsay testimony, *see Perales*, 402 U.S. at 402 (permitting reliance on hearsay written reports); *Binion ex rel. Binion v. Chater*, 108 F.3d 780, 788 n.5 (7th Cir. 1997), to an ALJ's consideration of evidence from outside the record, *see Adkins v. Astrue*, 226 F. App'x 600, 606-07 (7th Cir. 2007) (rejecting claimant's argument that ALJ violated Federal Rules of Evidence when considering medical reference text outside of the record).

It is thus no surprise that in the sixteen years since *Donahue*, social security hearings within the Seventh Circuit have *not* turned into mini-trials. They have instead retained all of the efficiency and informality Congress envisioned. Under the Seventh Circuit's approach, the vocational expert need only make the data underlying the expert's testimony "available on demand

to facilitate cross-examination and testing of the VE's reliability." *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008). This approach does not "endorse a system that drags out every Social Security hearing to an interminable length." *Id.* Instead, it requires the expert to provide the data only if asked to do so and only at the hearing itself. Moreover, ALJs are careful to require vocational experts to provide only the precise data upon which they rely, and nothing more. *See id.* at 802, 804. And the Seventh Circuit has ensured that its rules do not render every proceeding "impossibly long." *Id.* It has achieved this result by suggesting that applicants will question the expert about the data at the same hearing where the expert supplies it, perhaps with the benefit of a "brief recess[]" as necessary for review. *Id.* The Seventh Circuit's standard does not entitle the applicant to prehearing disclosures, nor does it obligate the ALJ to schedule supplemental proceedings. It simply requires that the vocational expert come to the hearing prepared to furnish and discuss the foundation for his or her conclusions and that the applicant or applicant's representative be given the opportunity to meaningfully inquire into the validity of the data and their connection to the expert's conclusions.

Lower courts have applied this straightforward rule without upsetting the balance it strikes. In cases where ALJs do not enforce the rule, lower courts reverse and remand. *See, e.g.*, *Powell v. Colvin*, No. 1:13-CV-51, 2014 WL 1643313, at *14-15 (N.D. Ind. Apr. 22, 2014); *Reynolds v. Astrue*, No. 09-C-0537, 2010 WL 2900356, at *4 (E.D. Wis. July 21, 2010). But courts have likewise recognized the rule's limitations and rejected arguments

that seek to broaden its application. *See, e.g., Khuzaie v. Comm'r of Soc. Sec.*, No. 1:14-CV-00199-SLC, 2016 WL 1253537, at *15 (N.D. Ind. Mar. 30, 2016) (rejecting argument that expert was required to provide data where applicant failed to request it); *Ronning v. Colvin*, No. 13 CV 8194, 2015 WL 1912157, at *9 (N.D. Ill. Apr. 27, 2015) (rejecting argument that expert failed to support her testimony where she identified specific sources of data, explained her methodology, and was able on cross-examination to reconcile and explain differences between figures).

This real-world experience belies the notion that the Seventh Circuit has imported the Federal Rules of Evidence or *Daubert* into social security proceedings. The Seventh Circuit's rule "increases the . . . reliability of the evaluation process" without compromising efficiency. *Bowen v. Yuckert*, 482 U.S. 137, 153 (1987). That is exactly what procedural mechanisms within the Social Security context should achieve. *Id.*

B. Expert testimony in administrative proceedings must be reliable, and this Court has recognised that reliability is best assured through cross-examination of the data and methodology resulting in the expert's conclusions.

The courts that do not require a vocational expert's underlying data upon request err in another important way. Even though the Federal Rules of Evidence do not apply in social security hearings, vocational expert testimony must still be reliable in order for an ALJ's reliance on that testimony to constitute substantial

evidence. This requirement of expert reliability has long existed in administrative law, and derives from common law principles that continue to animate judicial review of expert testimony. Reliability cannot be vindicated effectively without meaningful cross-examination of the expert, which in turn requires the expert to supply the foundation for his or her testimony if the applicant requests it.

In *Perales* this Court's inquiry into whether the medical reports could constitute "substantial evidence" focused on the reports' "underlying reliability." *Perales*, 402 U.S. at 402. As discussed above, the Court examined numerous aspects of the reports' content and the procedures available to the applicants to challenge them. *See* Part I.A.1, *supra*. The Court also examined more broadly the various contexts in which this form of expert testimony had been deemed reliable. *See Perales*, 402 U.S. at 403-04 (noting that written medical reports had been deemed reliable in civil litigation and judicial review of social security hearings). Likewise, in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), the Court emphasized—while reviewing an agency's decision to ensure, *inter alia*, that it was based upon substantial evidence, *see id.* 375 n.21—that while "an agency must have discretion to rely on the reasonable opinions of its own qualified experts ... courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance" of the information in the record, *id.*

at 378. *Marsh*, again, emphasizes that part and parcel of the substantial evidence inquiry is an examination of whether an expert's testimony is sufficiently reliable to be accepted.

Following this Court's lead, the courts of appeals have stressed the importance of reliability when assessing an agency's use of expert evidence in administrative proceedings. For example, in *United States Steel Mining Co. v. Director, Office of Workers' Compensation Programs*, 187 F.3d 384, 386 (4th Cir. 1999), the Fourth Circuit reversed the Department of Labor's determination that an individual qualified for survivors' benefits under the Black Lung Benefits Act. In reviewing the evidence relied upon by the agency, the court explained "in an agency proceeding the gate keeping function to evaluate evidence occurs when the evidence is considered in decision[-]making rather than when the evidence is admitted." *Id.* at 389. But this evaluation must nonetheless occur because "[a]bsent such a discipline to qualify evidence, administrative findings and orders could unacceptably rest on suspicions, surmise, and speculation." *Id.* Setting aside the speculative opinion of an expert, "the ALJ was without *any* evidence upon which to base a finding," and the court deemed the agency's determination unsupported by substantial evidence. *Id.* at 391; *see also Britton*, 521 F.3d at 803 ("A finding based on unreliable VE testimony is equivalent to a finding that is not supported by substantial evidence and must be vacated.").

That courts require agencies to rely upon reliable experts—even absent the application of the Federal

Rules of Evidence—is no surprise in light of the "common law['s] insistence upon 'the most reliable sources of information.'" *Daubert*, 509 U.S. at 592 (quoting Advisory Committee's Notes on Fed. Rule Evid. 602, 28 U.S.C. App., p. 755); *see also* 1 *McCormick On Evidence* § 10 (Kenneth S. Broun ed., 7th ed. 2013) (noting the common law is "exacting in its insistence on the most reliable sources of information"); *see* Albert S. Osborn, *Reasons and Reasoning in Expert Testimony*, 2 *L. & Contemp. Problems* 488, 488 (1935) (noting that "expert testimony that [is] not susceptible of illustration and explanation so as to be weighed by the ordinary hearer . . . is the class of testimony that can be rendered almost valueless in case of conflict and in many instances deserves the severest criticism. A bare opinion is a dangerous basis for a verdict"). Indeed, treatises dating back to 1777 recognized, "the first, therefore, and most signal Rule in Relation to Evidence, is this, That a Man must have the utmost Evidence, the nature of the Fact is capable of: For the Design of the Law is come to legal Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of." Geoffrey Gilbert, *The Law of Evidence* at 4 (4th ed. 1777). Rule 702 "relax[e]d the traditional barriers to 'opinion' testimony" at common law. *Daubert*, 509 U.S. at 588 (internal quotation marks omitted). But nothing in Rule 702, or this Court's decisions regarding the use of experts in either civil litigation or administrative proceedings, suggests that reliability is no longer the touchstone when determining whether expert testimony should be relied upon in establishing a fact upon which a decision-maker relies.

The ability to conduct probing cross-examination of an expert has long been understood by this Court as a critical means of assuring that an expert's testimony is, in fact, reliable. *See id.* at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Perales*, 402 U.S. at 410 (recognizing that "cross-examination as may be required for a full and true disclosure of the facts" is integral to the "integrity and fundamental fairness" of proceedings"); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 320 (2009) ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."); *see also* Stephan Landsman, *Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony*, 13 Behav. Sci. & L. 131, 139-40 (1995) (noting that in the 1800s, the advent of "[l]awyer cross-examination exposed weaknesses and uncertainties that had been previously unexplored [in expert testimony]").

Rejecting an applicant's request for access to the data that vocational experts *identify* as the basis for their testimony renders cross-examination effectively meaningless. "The age-old tool for ferreting out truth in the trial process is the right to cross-examination," which remains a hallmark for "testing the facts offered by the defendant on direct." *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989) (internal quotation marks omitted). And as several courts have recognized, "it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying

the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him." *Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs*, 480 F.3d 278, 301 (4th Cir. 2007). With no access to underlying data, an applicant cannot probe the basic question—fundamental to assessing an expert's reliability—of whether the expert's conclusions flow from a coherent analysis of reliable data sources. In turn, an ALJ who finds "other work" available to an applicant on that testimony alone has little means of assuring that the expert's testimony reliably supports that finding.

This problem is hardly theoretical. An undisclosed "confidential labor market survey," such as that cited by the vocational expert here, permits no verification that an individual allegedly placed at a job had the same limitations as the hypothetical individual described by the ALJ. In situations where an applicant's specific or unique limitations may be the exact reason why a certain job is in fact not viable, an ALJ's acceptance of undisclosed data on this critical fact may result in exactly the unreliable conclusion the substantial evidence standard is intended to protect against.

Likewise, particular employers may have unique or atypical jobs that do not more broadly represent the opportunities available within *DOT*-defined job categories. The fact that one employer, in one location, at one time, may have employed an individual with a set of limitations—or that in an unverified time period a particular job could be performed notwithstanding certain limitations—provides almost no means of

verifying that jobs currently available to an applicant exist in various regions in the country or within the national economy. And, even if an employer hired an individual with certain limitations, that single data point, alone, does not demonstrate that the individual was able to keep the job past an initial probationary or training period. Vocational expert testimony based on undisclosed private surveys cannot fulfill the government's burden in this regard.

Indeed, the problem is more acute still. In a situation like Petitioner's, not only is the applicant denied a means of showing (if it is the case) that the expert's conclusions are not supported by the underlying evidence, but an ALJ's perception of the reliability of an expert's testimony could well be *enhanced* because of the expert's citation to sources the expert nonetheless withholds. *See, e.g., United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985) (recognizing that "[t]he danger that scientific evidence will mislead the [factfinder] might be greater, for example, where the [factfinder] is not presented with the data on which the expert relies, but must instead accept the expert's assertions as to the accuracy of his conclusions"); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (describing a common concern among courts that technical expert testimony poses "substantial danger of undue prejudice and confusion because of its aura of special reliability and trustworthiness"). Even the Sixth Circuit recognizes that vocational experts cannot conjure their opinions out of whole cloth. But ALJs and reviewing courts have no way to eliminate that very possibility when an expert withholds the foundation for his or her testimony.

The agency's suggestion that an applicant might "tender his own evidence . . . [or] submit evidence that contradicted [the vocational expert's] estimates," is no solution to this problem. BIO 13. For one, it is the *agency's* burden to show the existence of other work by substantial evidence. The burden of proof shifts to the agency at step five "in express recognition of the manifest unfairness of requiring disabled, unemployed, mostly lower income applicants to prove a broad negative proposition about the absence of suitable alternative work in the labor market." *Overcoming Gridlock*, 62 Admin. L. Rev. at 964. Indeed, "[t]hat even the agency has openly acknowledged these fairness considerations in its burden of proof regulations further counsels against re[-]shifting this burden back to applicants." *Id.* (footnote omitted).

In addition, even were predominantly *pro se* applicants[5] able to surmount the substantial costs and practical difficulties in hiring their own vocational experts, a battle of experts is precisely the *opposite* of the efficient, cost-effective, and informal administrative scheme that Congress envisioned. The Seventh Circuit's rule eliminates the need for inefficient and

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[5] "[A] large portion of Social Security claimants either have no representation at all or are represented by non-attorneys." *Sims v. Apfel*, 530 U.S. 103, 112 (2000). *See* Soc. Sec. Advisory Board, *Filing for Social Security Benefits: What Impact Does Professional Representation Have on the Process at the Initial Application Level?*, 23, figure 4 (Sept. 2012) (aggregating data from the agency to find that only 14% of SSDI applicants and 4.5% of SSI applicants had representation at the initial application stage), https://legalaidresearch.org/wp-content/uploads/ssab-social-security-disability-representation-2012.pdf.

costly battles between experts in social security hearings. It would make little sense to insist upon exactly this as an applicant's only means of testing the reliability of the government's vocational expert.

C. A vocational expert's experience and credibility do not assure reliable conclusions.

In affirming the agency's decision, the Sixth Circuit found the ALJ had properly "weigh[ed] the credibility" of the vocational expert. Pet. App. 22a. And in defending the Sixth Circuit's decision, the agency repeatedly asserts that the ALJ was permitted to credit the vocational expert's testimony regarding the number of jobs available in Southeast Michigan between 2009 and 2013 based solely on the vocational expert's "11 years of professional experience as a vocational rehabilitation consultant." BIO 8; *see also id.* 12 ("[P]rofessional experience may constitute a valid basis for a vocational expert's testimony in a Social Security disability benefits hearing, where formal evidentiary rules do not apply at all."). But an expert's credibility and experience are no substitute for a meaningful inquiry into whether the specific fact-based conclusions the expert proffers are reliable.

In challenging the vocational expert's testimony and seeking access to the data upon which it was based, Petitioner sought to test the rationality and reliability of the expert's conclusions that jobs were available to him. Specifically, the expert provided estimates of various jobs available to Petitioner based on hypotheticals posed by the ALJ regarding Petitioner's limitations. Thus, the expert testified that if Petitioner were able to work at

the light exertional level, *see* 20 C.F.R. § 404.1567(b), he could take a job as a "bench assembler" with "6,000 jobs in Southeast Michigan." Pet. App. 116a. Next, the expert testified that if Petitioner could only perform work at the sedentary level, *see* 20 C.F.R. § 404.1567(a), he could still work as a bench assembler with "3,000 jobs in Southeast Michigan." Pet. App. 116a. She then testified that for under the sedentary exertion level the jobs numbers would need to be reduced further by "about 20 to 30 percent." Pet. App. 117a. In support of these numbers—meant to reflect the jobs market between October 2008 and May 2013—the expert said she was relying upon data from "the *Bureau of Labor Statistics* as well as [her] own individual labor market surveys." Pet. App. 119a.

The expert's testimony—the sole source for the ALJ's finding by "substantial evidence" of "other work" available to Petitioner in the regional economy—thus referenced specific jobs, at a specific time, in a specific place. To be sure, the expert's general experience may have aided her conclusion, and her credibility was a necessary condition for the ALJ's reliance upon her testimony. But, more critically, the expert's testimony required looking at data sources and drawing conclusions from those sources. And as the Seventh Circuit has recognized, it is the job of the ALJ to "hold the VE to account for the reliability of his job-number estimates." *Chavez*, 895 F.3d at 970. Job markets are dynamic, and the existence of certain jobs—and the qualifications required for them—may change over time. *Browning v. Colvin*, 766 F.3d 702, 709 (7th Cir. 2014) ("No doubt many of the jobs [in the DOT] have changed

and some have disappeared. We have no idea how vocational experts and administrative law judges deal with this problem.").

When an expert claims a specific evidentiary foundation for his or her testimony, and then withholds that foundation when asked to provide it, the expert's general experience and credibility are not sufficient to ensure the reliability that "substantial evidence" requires. Experience and credibility are important, but they provide no means for the applicant to test—and the ALJ to assess—whether the expert's data source is incomplete or unrepresentative, or the expert's methodology flawed. *See, e.g.*, *Andreu ex rel. Andreu v. Sec'y of Dep't of Health & Human Servs.*, 569 F.3d 1367, 1379 (Fed. Cir. 2009) ("A trial court makes a credibility determination in order to assess the candor of a fact witness, not to evaluate whether an expert witness' medical theory is supported by the weight of epidemiological evidence."); *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1201 (11th Cir. 2010) ("Merely demonstrating that an expert has experience . . . does not automatically render every opinion and statement by that expert reliable.").[6] Again, particularly when an expert acknowledges that a

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[6] Lower courts in the Seventh Circuit have applied exactly this reasoning in the context of vocational expert testimony. *See Holtz v. Astrue*, No. 07-C-314-C, 2007 WL 5323758, at *5 (W.D. Wis. Nov. 8, 2007) ("What Harris failed to explain, however, was the method she employed in making this reduction. All she cited was her experience, but that experience does not explain her math. She did not cite any formal market surveys that she or other vocational experts had done or even describe any informal method she employed to extrapolate her estimates from the state job data.").

conclusion rests on data, provision of that data to the opposing party is the best means of assessing the conclusion's reliability and worth.

III. REQUIRING VOCATIONAL EXPERTS TO PROVIDE ON REQUEST THE DATA UNDERLYING THEIR TESTIMONY IS CONSISTENT WITH THE AGENCY'S OWN POLICIES AND WITH COMMON SENSE.

In opposing certiorari, the agency argued that the problem identified by Petitioner might be of "limited prospective importance." BIO 18. In support of this claim, the agency cited the 2017 update to its *Vocational Expert Handbook*, which advises vocational experts that they "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." BIO 18 (citing *Vocational Expert Handbook* at 37). But the *Vocational Expert Handbook* is no solution. Most principally, it does not instruct vocational experts to provide on request the data on which they rely. And in any event the *Vocational Expert Handbook* is advisory, not mandatory. Given that the issue presented in this case only arises when an expert refuses to voluntarily provide data, advisory guidance furnishes little assistance.

That said, the *Vocational Expert Handbook* is significant in one important respect: It demonstrates the agency's acknowledgment that it is important for ALJs to evaluate the data underlying conclusions that vocational experts reach. The *Vocational Expert Handbook*'s acknowledgment of this fact makes the agency's legal position here all the more unsustainable.

Specifically, the *Vocational Expert Handbook* instructs each vocational expert to "be prepared to cite, explain, and furnish any sources" relied upon in formulating his or her hearing testimony. *See Vocational Expert Handbook* at 3, 19, 20, 28, 31. It likewise advises vocational experts that they "should have available, at the hearing, any vocational resource materials [on which they] are likely to rely"; and that they "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." *Id.* at 37. It informs vocational experts that "[i]n some cases, the ALJ may ask you to provide relevant portions of materials you rely upon." *Id.*

These instructions reflect a reality—entirely at odds with the agency's position here—that the say-so of a vocational expert is not enough for the ALJ to make a finding supported by substantial evidence. The agency recognizes that it is good policy for vocational experts to "cite, explain, and furnish any sources" upon which they rely. But it cannot explain why that policy makes sense only when an expert is willing to turn over the data, but not when the expert refuses. It is no answer, moreover, to claim that the purported "confidentiality" of private labor market surveys provides vocational experts with a coherent basis for refusing to share such information.[7] After all, there are myriad ways to protect the use and disclosure of confidential information in adjudications,

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[7] Since 2002, when the Seventh Circuit adopted its rule requiring disclosure on request, courts within the circuit have rejected a "confidential[ity]" exception without any problematic results. *See, e.g., Ramzan v. Colvin*, No. 12C7362, 2015 WL 5921811, at *7 (N.D. Ill. Oct. 9, 2015).

just as in civil litigation. If agencies and courts are equipped to handle highly sensitive information related to national security, trade secrets, and foreign affairs, surely labor market surveys can likewise be shared in a manner that does not jeopardize the vocational expert's "client files."

The agency has also recognized in contexts beyond the *Vocational Expert Handbook* that the say-so of a vocational expert is not enough. In a policy interpretation ruling, the agency explained that a vocational expert's testimony does not "automatically 'trump[]' when there is a conflict" with other evidence. SSR 00-4P, 2000 WL 1898704, at *2 (Dec. 4, 2000). To the contrary, the agency imposes "an affirmative responsibility" on the ALJ to inquire into, and resolve, "any possible conflict" between the expert's testimony and the occupational information listed in the *DOT* before the ALJ can rely on the vocational expert's testimony. *Id.* at *4. In resolving any conflict, the ALJ must "identify and obtain a reasonable explanation" for the expert's testimony. *Id.* at *1. Without such an explanation, the ALJ cannot rely on the expert's testimony in weighing the evidence. *Id.*

By placing this obligation on the ALJ, the agency is not "importing" the Federal Rules of Evidence into disability determinations. Rather, SSR 00-4P simply reflects the common sense reality that vocational expert testimony is not dispositive simply because it comes from a so-called expert. The same reality applies to testimony that a vocational expert provides about the extent of "other work" available to the applicant. Where the expert's testimony is challenged—in this case

through cross-examination by the applicant, rather than by conflict with the *DOT*—the expert's say-so is not enough. The ALJ must look behind the expert's conclusion to test its basis. Absent that inquiry, the ALJ is left with nothing more than unsupported conclusions and *ipse dixit*, neither of which rises to the level of substantial evidence. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Seventh Circuit's approach comports not only with the agency's policies but also with common sense. Where an expert references on cross-examination the existence of data sources on which the expert is relying, there is no legitimate reason for the expert to withhold those sources if the applicant requests to see them. After all, the sources must exist because they provide the purported basis for the expert's testimony. Experience from the Seventh Circuit over the last sixteen years demonstrates that providing the data does not delay or disrupt social security disability hearings. And the agency's own regulations recognize the benefits of vocational experts having their sources available upon request as a matter of good policy. If experts have no sources then there is no basis for the ALJ to find that their testimony constitutes substantial evidence. If they do have sources, there is no legitimate basis to withhold them.

* * *

This Court has recognized that "[t]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.'" *See Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983). Requiring vocational

experts to produce upon request the data underlying their conclusions advances the "need for efficiency" in this system while effectuating the requirement of substantial evidence. *Id.* (internal citation omitted). The rule is "understandable to the layman applicant," "efficient," and "fundamentally fair." *Perales*, 402 U.S. at 401-02. And, most important, it is consistent with this Court's interpretation of the requirement that a finding be supported by "substantial evidence" as required by § 405(g).

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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